90-828

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MELVIN R. KURR,

PETITIONER,

-VS-

VILLAGE OF BUFFALO GROVE, ET AT.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Melvin R. Kurr
9 E. Chevy Chase Drive
Wheeling, Illinois 60090
(708) 215-7665

Petitioner, Pro se

QUESTIONS PRESENTED

1. Whether it is a violation of the petitioner's Fourth Amendment right to be free from unreasonable searches and seizures for the Village in the operation of its public utility system to require the petitioner to grant to Village agents the right to conduct warrantless "free access" searches of the petitioner's home and warrantless seizures of the petitioner's property as a condition of continued service from the Village public utility system?

2. Whether the lower courts were in error in not addressing the petitioner's equal protection of the law claim in that the Village requirement that the petitioner, merely because he is a non-resident of the Village, must agree to allow Village agents "free access" to his home as a condition of continued public utility service while under the exact same circum-

stances Village residents may demand a "presentation of a warrant" from Village agents before granting access?

3. Whether the District Court was in error in finding that the petitioner was afforded due process of law in the termination of utility service by the Village?

LIST OF PARTIES

MELVIN R. KURR,

PETITIONER,

VS.

VILLAGE OF BUFFALO GROVE ET. AL.,*

RESPONDENTS.

*The Respondents are VILLAGE OF BUFFALO GROVE, an Illinois Municipal Corporation; VERNA CLAYTON, Village President, Village of Buffalo Grove; JANET M. SIRABAN, Village Clerk, Village of Buffalo Grove; GARY GLOVER, Village Trustee, Village of Buffalo Grove; JOHN MARIENTHAL, Village Trustee, Village of Buffalo Grove; SIDNEY MATHIAS, Village Trustee, Village of Buffalo Grove; WILLIAM REID, Village Trustee, Village of Buffalo Grove; PATRICK SHIELDS, Village Trustee, Village of Buffalo Grove; JORDAN SHIFRIN, Village Trustee, Village of Buffalo Grove; MELANIE KOWALSKI, Former Village Trustee, Village of Buffalo Grove; WILLIAM BALLING, Village Manager, Village of Buffalo Grove; WILLIAM RAYSA, Village Attorney, Village of Buffalo Grove; GREGORY BOYSEN, Director of Public Works, Village

of Buffalo Grove; WILLIAM BRIMM, Director of Finance and General Services, Village of Buffalo Grove; CHEVY CHASE SEWER AND WATER COMPANY, INC., an Illinois Corporation; CATHERINE JOHNSON, President, Chevy Chase Sewer and Water Company; WILLIAM JOHNSON,Vice-President, Chevy Chase Sewer and Water Company; HOWARD LANG, Attorney, Chevy Chase Sewer and Water Company; LAKE COUNTY HEALTH DEPARTMENT, COUNTY OF LAKE, State of Illinois; STEVEN POTSIC, Executive Director, Division of Environmental Health, Lake County Health Department; TED BYERS, District Supervisor, Division of Environmental Health, Lake County Health Department; JON CUNNINGHAM Associate Sanitarian, Division of Environmental Health, Lake County Health Department; and OTHER DEFENDANTS WHOSE TRUE NAMES ARE NOT KNOWN AT THIS TIME, individually and in their official capacities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The Seventh Circuit Court of Appeals in an unreported order (Appendix A) affirmed the judgment of the District Court. The memorandum opinion and order of the District Court (Appendix B) is also unreported.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on August 28, 1990. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1954 (1).

CONSTITUTIONAL, STATUTORY, ORDINANCE, AND CONTRACT PROVISION INVOLVED

United States Constitution:

Amendment Four: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Fourteen, Section 1: No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Buffalo Grove Municipal Code;

Title 13, WATER AND SEWERS, Chapter 13.04,

Section 230 Access to private property.

The village and its employees shall have ready access to the premises, places, or building where meters are located for the purpose of reading, examining, testing and repairing the same, examining and testing the consumption, use and flow of water.

The village and its employees shall have a right of entry to effectuate its duties under this chapter upon the consent of the owner of the premises, upon presentation of a warrant or in an emergency situation.

WATER AND SEWER AGREEMENT, paragraph 2-E:

[The Applicant shall]: Allow authorized agents of the Village free access to the premises at all reasonable hours for the purpose of reading, examining, repairing or removing the Village's meters and

other property, and also the applicant's lines and connections.

STATEMENT OF CASE

1. During the summer of 1976, the petitioner built his present family home in unincorporated Lake County, Illinois. At that time the water and sewer lines of the house were connected to the mains of the local public utility system; this system being owned and operated by Chevy Chase Sewer and Water Company, Inc., ("Chevy Chase"). From that time to Nov. 4, 1987, Chevy Chase provided water and sewer utility service to the petitioner's home. (Complaint ¶¶ 5 and 9).

2. In January, 1987, the owners of Chevy Chase (Catherine and William Johnson) being beneficiaries of certain properties held in trust, entered into an annexation agreement with the Village of Buffalo Grove, ("Village"). The annexation agree-

ment provided, among other things, that: a) the Village would annex approximately 200 acres being held in trust; b) Chevy Chase would transfer ownership of the utility system to the Village at an unspecified future date, and; c) that upon the transfer of the utility system to the Village, the Village would continue to provide utility service to the customers of the utility system. The petitioner's home was, otherwise, unaffected by the annexation agreement. (Petitioner's additional pleadings filed with the district court, Nov. 18, 1988.)

3. In January, 1987, as the Village was preparing to accept the transfer of the utility system, the Village sent to the customers of the utility system a "Water and Sewer Agrement" and an accompanying letter. The letter stated the Water and Sewer Agreement "should" be signed to prevent the "possibility" of an interruption

of utility service. The letter also informed the petitioner (along with the other customers of the system) that the Village had scheduled for Jan. 29, 1987, an "informational meeting" on the subject of the transfer of the utility system to the Village. The letter did not advise in any manner that the "informational meeting" would be a hearing for due process purposes. (Petitioner's additional pleadings filed with district court, Nov. 18, 1988.)

4. At this "informational meeting" the petitioner informed the Village representatives that in his opinion the Water and Sewer Agreement contained illegal provisions and he had no intention to sign the Agreement. (Petitioner's additional pleadings filed with the district court, Feb. 14, 1989.)

5. On Nov. 3, 1987, the petitioner found attached to his front door a letter from

William Johnson, vice-president of Chevy Chase. This letter stated the Village was going to disconnect the petitioner's utility service that afternoon. (Complaint ¶ 8, Exhibit C.) Also found that day at the petitioner's front door was a letter from Gregory Boysen, Director of Public Works, "certifying" that Boysen placed in the petitioner's mailbox a copy of the Water and Sewer Agreement. The Boysen letter also stated "Please call Greg Boysen at 459-2547 before 9 am on Thursday, 11/5/87 to make arraingements [sic] to get Village water and sewer service." (Complaint ¶ 8, Exhibit D.)

6. On Nov. 4, 1987, the Village assumed "operational control" of the Chevy Chase utility system. (Complaint ¶ 9.)

7. On Nov. 5, 1987, the petitioner did call Gregory Boysen. During this phone conservation the petitioner did state that he would pay reasonable rates for service

and abide by reasonable regulations. Gregory Boysen insisted that the Village could not supply the petitioner with utility service unless the petitioner signed the Water and Sewer Agreement, and if the petitioner did not sign the Water and Sewer Agreement Chevy Chase would be shutting off the petitioner's utility service. (Complaint ¶ 10, letter from Boysen to petitioner confirming phone conservation, dated Nov. 5, 1987, attached to Exhibit U.)

8. Approximately forty-five minutes after the above noted phone call by the petitioner to Boysen, Village employees under the direction of Boysen shut-off utility service to the petitioner's home. (Complaint ¶¶ 11 & 12.)

9. On Oct. 25, 1987, the petitioner filed in the United States District Court a complaint against the respondents alleging, among other things, violation of the petitioner's rights under U.S. Constitu-

tion, Article I, § 10, "Contract Clause," Amendments 1, 4, and 14 as enforceable under Title 42 of the U.S. Code, § 1983.

BASIS FOR FEDERAL JURISDICTION BELOW

The jurisdiction of the District Court was invoked under Title 28 U.S.C. § 1331 and 1343.

REASONS FOR GRANTING THE PETITION

1. This case presents an unusual yet important Fourth Amendment question that the lower courts have decided in a way that is in serious conflict with the applicable decisions of this Court. The gist of the question presented is whether a municipal corporation operating a public utility system can require that its agents have the right to conduct warrantless "free access" searches and seizures in a customer's home as a condition of continued service. And yet if the customer does not consent to such searches and seizures and utility service is terminated because of the nonconsent, criminal prosecution is threatened for not having utility service.

The substance of the instant cause is the Village of Buffalo Grove acquired an existing water and sewer public utility system that theretofore provided such service to the petitioner. The system is

located outside the Village limits. The Village then demanded, as a condition of continued service from the system, that the petitioner sign a "Water and Sewer Agreement." Under paragraph 2-E of this Agreement (see p. 10) Village agents would have the authority to conduct warrantless "free access" searches and seizures in the petitioner's home. [See Maier v. Mayor of Mountain Lakes, 110 A2d 140, 142 (1954) judicial definition of "free access" is: unobstructed, open, clear, unhampered, unrestricted, and unimpeded access.] [Also see Shepard v. Milwaukee Gaslight, 6 Wis 539, 548-549 (1858), public utility can not demand "free access" as condition of service.] Further Village agents could execute searches and seizures of the petitioner's home at hours only they think are reasonable, and also use force to enter. There would be no limitations upon the agents as to the frequency, extent, or

scope in conducting searches and seizures. The petitioner would be left to the agents' arbitrary and unbridled discretion. This is true even though village residents customers of the Village utility system may demand "presentation of a warrant" before permitting entry to Village agents, (see p. 10 for pertinent section of the Buffalo Grove Municipal Code).

Moreover, the Lake County Health Department has threatened the petitioner with criminal and/or civil action because the Village has shut-off utility service to the petitioner's home since he has not signed the Village Water and Sewer Agreement. This has put the petitioner between a rock and a hard place. If he does not sign the Agreement the petitioner is faced with criminal prosecution, the result of which may be a jail sentence, and with civil action, the outcome may be the forcible eviction from his home. But if the

petitioner does sign the Agreement he would be subject to unannounced warrantless "free access" searches and seizures by Village agents. For the Village to place the petitioner in this unenviable position not only is unjust but unconstitutional as well.

The district court's opinion, affirmed by an appeals court per curiam order, is in sharp contrast to all the relevant Fourth Amendment decisions of this Court.

It is established rule of law the Village can not condition an entitlement requiring the waiver of a constitutional right, Frost & Frost v. Railroad Comm'n, 271 US 583, 594 (1926). And because the Fourth Amendment is designed to prevent, not simply redress unlawful Village action, Steagald v. United States, 451 US 204, 215 (1981), the petitioner need not first sign the Water and Sewer Agreement then wait for Village agents to conduct an unlawful

search or seizure before seeking relief.

This Court has consistently held, absent consent or exigent circumstances, a warrantless search of private residences is presumptively unreasonable, Steagald, supra, 451 US at 212; Payton v. New York, 445 US 573, 590 (1980); See v. Seattle, 387 US 541, 543 (1967); even for periodic routine inspections, Michigan v Tyler, 436 US 499, 504 (1978). And consent to search can not be coerced by explicit or implicit means, by threats or covert force, Schneckloth v. Bustamonte, 412 US 218, 228 (1973). Yet this is precisely what the Village has done by shutting-off utility service. Coercive means have been employed by the Village to force the petitioner to either sign the Water and Sewer Agreement, thus consenting in advance to warrantless "free access" searches and seizures by Village agents, or face possible criminal prosecution by the County for not having

potable water service in his home. For comparison, this Court in Wyman v. James, 400 US 309 (1971) found that if entry by caseworker into a welfare recipient's home was a "search" it was not unresonable in that refusal by recipient to permit entry merely caused payments to cease and no criminal prosecution was threatened, 400 US 317, 318, 325.

The Village's demand its "authorized agents" be allowed to conduct warrantless "free access" searches and seizures would place the petitioner at great peril. With the ever increasing crime rate it is not unusual for members of the criminal element to masquerade as "authorized agents" Camara v. Municipal Court, 387 US 523, 531 (1967). However, the Village has failed to inform the petitioner of any method to verify whether persons claiming to be "authorized agents" really are authorized agents. The petitioner would either have

to risk permitting into his home persons who are not "authorized agents," or risk the wrath of the Village for denying "free access" to truly "authorized agents." (The wrath of the Village could be claiming the petitioner with breaching the Agreement and thus shutting-off utility service.) Only the requirement Village agents first procure a warrant - if so demanded - may the petitioner be assured persons claiming to be "authorized agents" really are authorized agents, Michigan v. Tyler, supra, 436 US at 508. Compare with Wyman, supra, 400 US at 323, caseworker "is a friend" to welfare recipient thus presumably caseworker was known to the recipient. In the instant cause the petitioner would not know difference between Village agents and the man in the moon.

The Village additionally has failed to define what are "all reasonable hours." A reasonable hour to one person can be an

unreasonable hour to another person. Village agents could appear at the petitioner's front door demanding "free access" at an hour the petitioner considers unreasonable. But the requirement that agents of the Village first appear before a neutral magistrate to show probable cause assures that the proposed search is executed at a reasonable and convenient time, Michigan v. Clifford, 464 US 287, 294 (1984). Compare with Wyman, supra, 400 US at 321, state law and regulations prohibit entry at unreasonable hours. A warrant would also assure that the proposed search is reasonable under the Constitution, authorized by state law, and is pursuant to a neutral administrative plan, Marshall v. Barrow's Inc., 436 US 307, 323 (1978). In presenting the warrant it would inform the petitioner, then and there, the scope and object of the search beyond which the agents are not expected to proceed, id., and also

prevent the arbitrary and unbridled discretion of the agents from interfering with the petitioner's reasonable privacy expectations, id., New Jersey v. T.L.O., 469 US 325, 335 (1985); Steagald, supra, 451 US at 211, 212, United States v. Chadwick, 433 US 1, 10 (1977); Camara, supra, 387 US at 534. Cf. Wyman, supra, 400 US at 321, privacy of welfare recipient is emphasized.

The Village further demands that its agents have free access "for the purpose of ... examining, repairing or removing ... [the petitioner's] lines and connections." This Court has held "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property," United States v. Jacobson, 466 US 109, 113 (1984). Village agents on their own, without any input from the petitioner or anybody else for that matter, for whatever

reason, could determine the "lines and connections" within the petitioner's home and owned by him are inadequate or are in violation of some regulation. Then undertake repairs or even remove the offending "lines and connections." (The lines and connections include among other things a dishwasher and clothes washer.) Village agents would not have to show to anyone that the alleged offending "lines and connections" are a threat to the utility system or is violation of an applicable regulation. The Village is simply attempting to extend its authority over the petitioner's property. Yet under Illinois law the Village has absolutely no duty to examine, much less repair or remove, the petitioner's "lines and connections," Hulett v. Central Illinois Light Co., 403 N.E.2d 790, 793 (1980).

A heavy burden is carried by the Village to justify why its agents need an

exemption to the warrant requirement, Coolidge v. New Hampshire, 403 US 443, 455 (1971); Chimel v. California, 395 US 752, 762 (1969). Not only has the Village failed to proffer any reason why its agents need an exemption from the warrant requirement but its own Municipal Code negates any possible claim for such exemption. As noted earlier on page 19, village resident customers of the utility may demand "presentation of a warrant" This utterly contradicts any reason the Village may have that its agent need "free access" to the petitioner's home. How on one hand the Village grants to its residents the right to demand a warrant yet on the other hand, under the exact same conditions deny to the petitioner the same right to demand a warrant simply boggles the mind.

2. Since the petitioner has pled pro se, the lower courts are to liberally construe

the complaint and other pleadings, Wilson v. Civil Town of Clayton, 839 F2d 375, 378 (7th Cir., 1988); and the appeals court is to glean the gist of the appeal from a liberal reading of the complaint and briefs, Robinson v. Price, 615 F2d 1097, 1098 (5th Cir., 1980), citing Haines v. Kerner, 404 US 519 (1972).

In the complaint, at ¶ 84, the petitioner claimed the requirement found in the Water and Sewer Agreement that the petitioner allow free access to Village agents violated the petitioner's 14th Amendments rights. In the various papers filed with the district court the petitioner made it plain that one of the claims in the complaint was that the free access provision treated the petitioner differently then village residents, thus was a violation of the equal protection clause. (Petitioner's additional pleadings filed with the district court,

Nov. 14, 1988.)

While on appeal, the petitioner did not make the failure of the district court to address the equal protection claim a separate question for review, the petitioner's appellate brief made it abundantly clear the petitioner sought for review the district court's failure to address the issue. Yet if the petitioner were to file a complaint in state court claiming a violation of the equal protection clause the Village would claim res judicata since the district court dismissed all of the Federal claims.

3. The courts below failed to correctly apply the decisions of this Court in regards to the petitioner's claim the Village did not afford the petitioner due process of law.

This Court has held that due process requirements come into play when an entit-

lement is involved, Goldberg v. Kelly, 397 US 254, 262 (1970). Entitlements are created by independent sources such as state law, this includes state decisional law, Memphis Light v. Craft, 436 US 1, 9 (1978). Under Illinois decisional law the petitioner has a legitimate claim of entitlement to Village utility service. In Amalgamated Trust v. Village of Glenview, 98 Ill App 3d 254 (1980), the First Appellate Court stated "a cause of action may exist against a municipality if it acquires a company which was bound to serve customers prior to the sale." 98 Ill App 3d at 259. "Invocation of this rule, however, depends upon the relationship between the nonresidents and the original facility. Obviously, if no obligation to supply water exists in the first instance, a municipality that purchases its extraterritorial predecessor assumes no greater duties." 98 Ill App 3d

at 260. Prior to the transfer of the utility system to the Village, Chevy Chase had the duty to supply the petitioner with such service. Thus, the Village upon acquiring the utility system from Chevy Chase also acquired the duty to continue such service. Therefore, the Village must afford the petitioner due process before it may terminate service.

However, the district court erroneously read the complaint and other pleadings to reach the conclusion that the petitioner was afforded due process. The district court found "[The petitioner's] complaint alleges that he received ten communications ... regarding the impending actions of the Village. (Complaint ¶ 8, 14, 15, 18, 21, 29, 30 and 37; Exhibits C, D, F, G, I, K and S)." See page B-23. This finding by the district court is in serious conflict with the complaint itself and with the exhibits. Complaint ¶¶ 14,

15, 18, 21, 29 30, 37, and exhibits F, G, I, K, and S occurred after the Village shut-off utility service. Notice after the fact does not comport with due process, Fuentes v. Shevin, 407 US 67, 81-82 (1972). Though the district court was correct that ¶ 8 of the complaint was before the Village terminated service, the "notice" contained in exhibit C, that the Village was going to terminate service, was from Wm. Johnson, vice-president of Chevy Chase. See statement ¶ 5. Because Mr. Johnson is not a Village official, and the petitioner was not advised that Johnson was acting as a representative of the Village, the "notice" from Johnson must be considered from an extra-official source, it does not comply with due process, Coe v. Armour Fertilizer, 237 US 413, 424 (1915). And the letter from Gregory Boysen, Village Director of Public Works, was inadequate to advise the petitioner to

a pre-termination hearing. The statement in the Boysen letter that the petitioner should "call ... to make arrangements to get Village [utility service]," can not be considered notice to the petitioner's right to a pre-termination hearing. See Memphis Light, supra, 436 US at 13, notice containing phone number to call is not notice to a pre-termination hearing; also Palmer v. Columbia Gas, 479 F2d 153, 166 (6th Cir., 1973), wording that one should make "satisfactory arrangements" held constitutionally lacking.

Additionally, the phone conservation between petitioner and Boysen can not be thought of "notice" that the Village would be terminating service. Boysen claimed that Chevy Chase, not the Village would be terminating the petitioner's utility service. See statement ¶¶ 7 & 8. This shows a classic case of passing the buck, on one hand, Chevy Chase was claiming the

Village was going to terminate the petitioner's utility service, statement ¶ 5. And yet on the other hand, the Village was claiming Chevy Chase would be shutting-off petitioner's utility service, statement ¶ 7. The petitioner could not make an intelligent decision faced with this total lack of responsibility flowing from both the Village Chevy Chase. See Mullane v. Central Hanover Trust, 339 US 306, 315 (1950), when notice is a person's due, process which is a mere gesture is not due process.

The phone call by the petitioner, further, can not be considered a "hearing" for due process purposes. The petitioner was not advised that the phone call was a "hearing" upon his complaint the Water and Sewer Agreement contains illegal provisions, statement ¶ 7. Thus, since the Village failed to apprise the petitioner that, and permit him adequate preparation

for the "phone call hearing," it can not be thought of as a due process hearing. See Memphis Light, supra, 436 US at 14. The phone call itself amounted to nothing more than an argument of contradiction. The petitioner agreeing to pay the reasonable utility rates of the Village. Boysen claiming the Village could not render service if the petitioner did not capitulate and sign the Agreement, and further stating Chevy Chase would be shutting-off utility service if the petitioner did not sign up.

The district court also erroneously found that the "informational meeting" was a hearing for due process purposes. (See statement ¶ 4, and district court opinion page B-23.) The letter the petitioner received, noted in statement ¶ 3, only informed that the Village was acquiring the Chevy Chase utility system, and that the Village would be holding an "informa-

tional meeting" for all the customers of utility system to answer any questions concerning the impending transfer of the utility system. The letter did not state that the "informational meeting" was to be considered a due process hearing. Such is exemplified by the fact that after the petitioner complained to the Village representatives at the meeting that the Water and Sewer Agreement contained illegal provisions, (statement ¶ 4), the Village did absolutely nothing, in the intervening nine month period before acquiring the system, to allay the petitioner's objections to the Water and Sewer Agreement. Clearly, the Village failed to provide an employee empowered to resolve the petitioner's objections, thus the "informational meeting" may not be considered a due process hearing. Memphis Light, supra, 436 US at 22.

CONCLUSION

Wherefore, for the forgoing reasons the petitioner prays that this Honorable Court grant the Petition and issue a Writ of Certiorari to the Seventh Circuit Court of Appeals.

RESPECTFULLY SUBMITTED,

MELVIN R. KURR,
Petitioner, pro se

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 21, 1990*
August 28, 1990

Before

Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Wilber F. Pell, Senior Circuit Judge

MELVIN R. KURR,	) Appeal from
	) the United
Plaintiff-Appellant,	) States Dis-
	) trict Court
No. 89-2321 vs.	) for the
	) Northern
VILLAGE OF BUFFALO GROVE,	) District of
et al.,	) Illinois,
	) Eastern
Defendants-Appellees.	) Division
	No. 88 C 9051
	James F. Holderman, Judge.

O R D E R

Plaintiff-Appellant, Melvin R. Kurr, appeals from the district court's decision dismissing his cause of action and entering judgment in favor of the defendants.

After reviewing the decision of the district court, the briefs, and the record, we have determined that it properly identified and resolved the issues before us on appeal; therefore, we affirm the decision of the district court for the reasons stated in the attached memorandum opinion.

On appeal, the Village of Buffalo Grove seeks fees and costs pursuant to 42 U.S.C. § 1988 and under Rule 11 of the Federal Rules of Civil Procedure, arguing that the appeal was frivolous. Rule 11 is an inappropriate vehicle for obtaining sanctions in this court; however, Rule 38 of the Federal Rules of Appellate Procedure does provide for the imposition of damages and costs for taking a frivolous appeal. Therefore, we will analyze the request for fees and costs under § 1988 and Rule 38.

In this case, the district court provided the appellant with a twenty-five

page detailed analysis of why his allegations failed to state a claim under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. In Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173 (1980), the Supreme Court noted that a plaintiff in a civil rights action under § 1983 "'should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" Id. at 15, 101 S. Ct. at 178-79 (quoting Christainsburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 422, 98 S. Ct. 694, 701 (1978). In deciding to file an appeal after the district court's detailed and comprehensive disposition, Kurr elected to continue to litigate after his claim had clearly become frivolous; therefore, we impose sanctions pursuant to § 1988 and Rule 38 of the Federal Rules of Appellate Procedure. The Village is

ordered to file within fourteen days a statement of the costs and attorney's fees it has incurred in litigating this appeal.

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34 (f). Plaintiff-Appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MELVIN R. KURR,

Planitiff

v. No. 88 C 9051

VILLAGE OF BUFFALO GROVE,

Defendants

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Melvin R. Kurr filed this complaint pro se on October 25, 1988. Mr. Kurr's complaint alleges that the Village of Buffalo Grove (the "Village"), Chevy Chase Sewer and Water Company, Inc. ("Chevy Chase"), the Lake County Health Department ("LCHD"), and a number of individuals connected with these entitles violated Mr. Kurr's constitutional rights when they terminated his water and sewer services. Each of the defendants has

moved to dismiss Mr. Kurr's complaint pursuant to Fed. R. Civ. P. 12(b) (6).

FACTS

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b) (6), the court must accept as true the well-pleaded facts in the complaint. Hishon v. King and Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). In addition, the court must construe a complaint filed by a pro se plaintiff more liberally than a complaint drafted by a lawyer. Wilson v. Civil Town of Clayton, Ind., 839 F.2d 375, 378 (7th Cir. 1988); Harris v. Fleming, 839 F.2d 1232, 1239 (7th Cir. 1988). With these principles in mind, the court discerns the following facts from the complaint:

Mr. Kurr owns a home in Lake County, Illinois. During the summer of 1976 Mr. Kurr entered into an oral contract with defendant Chevy Chase. The contract

permitted Mr. Kurr to connect to Chevy Chase's water and sewer mains and obligated Mr. Kurr to pay for water and sewer services at the rates established by the Illinois Commerce Commission ("ICC"). Mr. Kurr began to pay Chevy Chase for water and sewer services in October, 1976.

On November 2, 1987 the Board of Trustees for the Village of Buffalo Grove (the "Trustees")[1/] passed Resolutions 87-53 and 87-54. Resolution 87-53 approved an agreement between the Village and Chevy Chase which obligated Chevy Chase to make certain improvements to it's facilities (the "Improvement Agreement"). (Exhibits V and X). Resolution 87-54 approved an agreement between the Village and Chevy Chase agreed to transfer to the Village certain of its assets, including its water and sewer systems (the "Transfer Agreement").

(Exhibits W and Y).[2/] These resolutions and the related agreements authorized the Village to provide water and sewer services to homeowners who had previously been serviced by Chevy Chase.[3/]

On November 3, 1987 Mr. Kurr received a letter from defendant William Johnson, the Vice President of Chevy Chase. (Exhibit C). The letter notified Mr. Kurr that the Village intended to disconnect Mr. Kurr's water and sewer service unless Mr. Kurr submitted a signed :Water and Sewer Agreement" set forth a contract between the Village and a signitory homeowner agreed to pay for these services at rates established by the Village. (Exhibit E). On the same day, Mr. Kurr received a letter signed by Gregory P. Boysen, the Village's Director of Public Works. Mr. Boysen's letter certified that he had left a copy of a "Water and Sewer Agreement" in Mr. Kurr's

mailbox on that date. (Exhibit D).

The village disconnected Mr. Kurr's water supply at 9:00 a.m. on November 5, 1987. Mr. Kurr protested the Village's action to Mr. Boysen by telephone, but Mr. Boysen nonetheless permitted Village employees to disconnect Mr. Kurr's residence from the water main. On the evening of November 5, 1987, Mr. Kurr telephoned Chevy Chase and left the message that the Village had disconnected his water supply. Mr. Johnson responded the following day that Chevy Chase no longer supplied sewer and water service to Mr. Kurr's subdivision.

After the Village disconnected Mr. Kurr's water supply, the LCHD began its attempts to convince Mr. Kurr to sign a Water and Sewer Agreement. On November 13, 1987, defendant Ted Byers, the District Supervisor for the LCHD, notified Mr. Kurr that if he did not

reconnect to the Buffalo Grove water supply, the LCHD would seek legal action through the Illinois State's Attorney's Office. (Exhibit G). In response, Mr. Kurr telephoned Mr. Byers and Steven Potsic, the Executive Director of the LCHD, and informed them that his home had been connected to the available water and sewer service since 1976 but was wrongfully disconnected by the Village when it took possession of Chevy Chase. Mr. Kurr memorialized this conversation in a letter dated November 17, 1987. (Exhibit H).[4/]

The Village then attempted to disconnect Mr. Kurr's sewers from the Village's sanitary system. On December 12, 1987 Mr. Byers sent Mr. Kurr a certified letter warning him that the Village intended to dig up and disconnect Mr. Kurr's sewers. On the evening of December 17, 1987, several Village employees

parked two or three Village of Buffalo Grove Public works trucks in front of Mr. Kurr's house and began to flash the amber lights on top of their trucks. The employees then "began to run about Plaintiff's neighbors' back yards in a generally disruptive manner," asserting that they were trying to locate Mr. Kurr's sewer line. (Complaint, ¶ 23). Mr. Kurr asserts that these actions were unnecessary because the employees knew fully well where Mr. Kurr's sewer line was located. (Complaint, ¶ 24).

In February, 1988 Mr. Kurr lost the alternative water source he had obtained via his neighbor, Fred Abberton. In November, 1987 Mr. Kurr and Mr. Abberton entered into a contract for an interconnection with Mr. Abberton's water hookup. Mr. Abberton agreed to permit Mr. Kurr to run a hose from Mr. Abberton's outside hose bibb to

Mr. Kurr's outside bibb. M. Kurr, in return, agreed to pay Mr. Abberton a "fair and reasonable amount" for the water he used. (Complaint, ¶ 19). On February 6, 1988, however, the Village notified Mr. Abberton violated the Buffalo Grove Municipal Code as well as the Water and Sewer Agreement. Mr. Kurr therefore disconnected the hose at Mr. Abberton's request.

On February 22, 1988 the ICC received a "Petition for Termination" dated February 17, 1988 from defendant Howard Lang, Chevy Chase's attorney. The Petition requested the ICC to revoke Chevy Chase's Certificate of Public Convenience and Necessity. (Exhibit N). The ICC held hearings on April 7, June 7 and July 5, 1988 to determine whether the certificate should be revoked. Defendants William Johnson, Howard Lang, and William Raysa attended these

hearings. On July 5, 1988 the ICC granted Chevy Chse's request for revocation.

Mr. Kurr sought assistance from the State of Illinois to correct the allegedly wrongful actions of the Village. On December 1, 1987 Mr. Kurr complained to the Illinois Attorney General's Office about the actions of the Village and its employees. However, the Attorney General's Office informed Mr. Kurr on January 22, 1988 that they had forwarded his complaint to the Illinois Department of Public Health (the "IDPH"). On April 13, 1988 IDPH officials informed Mr. Kurr that defendant Judith Munson was in charge of Mr. Kurr's complaint, but told him she was out of town on business and could not be reached. On June 23, 1988 Ms. Munson finally notified Mr. Kurr that the IDPH could not take action against the Village for denying Mr. Kurr a supply of water.

Both the LCHD and the Village persisted in its attempts to convince Mr. Kurr to sign a Water and Sewer Agreement. On March 21 and 22, 1988 Mr. Byers telephoned Mr. Kurr three times and warned him that the Village intended to dig up his sewer if Mr. Kurr did not submit a signed agreement. In response, Mr. Kurr requested the telephone company to change his telephone number and remove it from the telephone listing. On June 14, 1988 Mr. Kurr received a letter from defendant Raysa, the Village attorney, informing him that Illinois law required Mr. Kurr to sign the Water and Sewer Agreement before the Village could provide water and sewer service. Mr. Kurr replied to Mr. Raysa by registered letter that the Village and its employees had acted unlawfully in disconnecting him from the available water system.

Because Mr. Kurr refused to submit a signed agreement, the Village Board[5/] voted in an Executive Session not to restore water service to Mr. Kurr's home.[6/]

Mr. Kurr filed his complaint on October 25, 1988. Mr. Kurr's complaint alleges that defendants' actions violated Mr. KUrr's rights under the United States Constitution, art. I, Sections 2 and 16; and Sections 1983, 1985(3) and 1986 of the United States Code, tit. 42. In addition, Mr. Kurr's complaint alleges that the Water and Sewer Agreement deprives him of property without just compensation in violation of the Fifth Amendment; violates his Fourth Amendment freedom from unreasonable searches and seizures; and deprives him property without due process of law. Mr. Kurr's complaint also asserts state law causes of action against certain of the defendants.

The complaint names as defendants several individuals and entities:

1. Chevy Chase; Catherine Johnson and William JOhnson, the President and Vice-President, respectively, of Chevy Chase; and Mr. Lang, Chevy Chase's attorney (collectively referred to in this opinion as the "Chevy Chase defendants");
2. The Village; Verna Clayton, the Village President; Janet Siraban, the Village Clerk; William Balling, Village Manager; Mr. Boysen; Mr. Raysa; William Brimm, Director of Finance; and the current and former members of the Board of Trustees (collectively referred to in this opinion as the "Village defendants");
3. The LCHD, Mr. Potsic, Mr. Byers, and Mr. Cunningham (collectively referred to in this opinion as the "Lake County defendants"); and
4. Judith Munson, the Staff Attorney for the IDPH.

Each of these groups of defendants have moved to dismiss Mr. Kurr's complaint.

DISCUSSION

In deciding whether to dismiss a complaint under Fed. R. Civ. P. 12(b) (6), the court must view the allegations in the complaint in the

light most favorable to the plaintiff. Hishon v. King & Spaulding, 467 U.S. at 73, 104 S. Ct. at 2232. "A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of acton." Doe v. St Joseph's Hospital, 788 F. 2d 411, 414 (7th Cir. 1986). A dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 78 S. Ct. 99 (1957).

A. Claims Directly Under the Constitution

1. The Contracts Clause

Mr Kurr complains that the Village violated the contracts clauses of the federal and state constitutions by passing Resolutions 87-53 and 87-54. See U.S. Const. art.

I, Section 10; Ill. Const. art. I, Section 16. These constitutional provisions, which are identical, prohibit a state from passing laws which impair the obligation of existing contracts, Mr. Kurr asserts that, by transferring the water and sewer facilities from Chevy Chase to the Village via Resolutions 87-53 and 87-54, the Village impaired the obligation of the contract which has existed between Mr. Kurr and Chevy Chase since 1976.

Despite its manditory language, the prohibition contained within the contracts clause is not absolute. The Supreme Court has outlined a three-step inquiry to determine whether or not a law violates the contracts clause. See Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 410, 103 S. Ct. 697, 703 (1983). First, the court must determine whether

the ordinance in fact operates as a substantial impairment of existing contractual relationships. Second, the court must inquire whether the city has a significant and legitimate public purpose justifying the ordinance. Finally, the court must ask whether the effect of the ordinance on the contract is reasonable and appropriate given the public purpose behind the ordinance. Chicago Board of Realtors, Inc. v. City of Chicago, 819 F. 2d 732, 736 (7th Cir. 1987).

Mr. Kurr's complaint does not allege sufficient facts to state a claim under the contracts clause. First, the Improvement Agreement (which the Board approved by passing Resolution 87-53) did not affect in any way Chevy Chase's obligation to provide water and sewer service to Mr. Kurr. (Exhibit V). The Improvement Agreement merely

obligated Chevy Chase to make certain improvements to its property. Second, the Transfer Agreement (which the Board approved by passing Resolution 87-53) contained the following clauses:

> C. It is understood and agreed that the Village is not assuming any obligation of Chevy Chase to suppy water or sewer service to Chevy Chase's customers, current or potential.
>
> . . .
>
> E. It is understood and agreed that the Village does not incur any of Chevy Chase's contractual obligations to provide water and sewer service to Chevy Chase's customers, current or potential.

(Exhibit Y). The Transfer Agreement, by its terms, did not disturb Chevy Chase's obligations to provide water and sewer service to Mr. Kurr's property. Resolution 87-54 therefore did not impair the relationship which had existed between Chevy Chase and Mr.

Kurr since. 1976. The Board did not violate the contracts clause by passing the resolutions.

The Village did not impair Mr. Kurr's agreement with Chevy Chase by passing Resolutions 87-53 and 87-54. The contract was impaired, if at all, when Chevy Chase stopped providing water and sewer service to Mr. Kurr's property. Despite Mr. Kurr's allegations that Resolutions 87-53 and 87-54 impair the obligation of his contract with Chevy Chase (Complaint ¶ 48), nothing in either of these resolutions or the related agreements suggest that actions of the Village or its agents motivated Chevy Chase to cease its performance under the contract. Mr. Kurr's complaint therefore fails to state a claim under the contracts clause.

2. Due Process

Mr. Kurr next alleges that the Village deprived him of due process in violation of the Fifth Amendments when it disconnected his water and sewer hook-ups. In order to establish a denial of due process, Mr. Kurr must show (1) that he was deprived of a constitutionally protected life, liberty, or property interest, and (2) that the Village did not afford Mr. Kurr the process due him under the circumstances. Board of Regents v. Roth, 408 U.S. 564, 570, 92 S. Ct. 2701 (1972). The court will assume, for the purposes of this motion to dismiss, that Mr. Kurr has a protected property interest in sanitation services and a supply of potable water. See Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 1561 (1978).[7/] Mr. Kurr's due process challenge depends on whether the Village deprived him

of this interest without affording him the process he was due.

Read literally, the complaint presents a very limited due process challenge to the defendants' actions. Mr. Kurr alleges that the Village deprived him of due process by violating certain state and municipal laws. Specifically, he claims that the Village, its officers, and the Board of Trustees (1) provided water and sewer service outside its corporate limits without complying with Division 149 of the Illinois Municipal Code. [8/] (2) disconnected his water and sewer service without complying with the Buffalo Grove Municipal Code, tit. 13, ch. 04, Section 250; [9/] and violated Principle I and Section 890.1510 of the Illinois Plumbing Code. [10/] (Complaint, 49-55).

Mr. Kurr cannot base a constitutional claim on these alleged violations

of state and municipal law. The Seventh Circuit has made abundantly clear that a violation of state law is not a violation fo the due process clause. See, e.g., Coniston Corp. v. Village of Hoffman Estates, 844 F. 2d 461, 467 (7th Cir. 1988); Kasper v. Board of Election Commissioners, 814 F. 2d 332, 342 (7th Cir. 1987) ("A district court has no supervisory powers and no authority to instruct the Board on how to follow state law."). Mr. Kurr therefore cannot state a claim under the Due Process Clause against the Village, its officials, or the Board of Trustees for violating state or local laws.

Reading the complaint liberally, or on the other hand, it appears to the court that Mr. Kurr believes he was denied due process when the Village disconnected his water and sewer service

without providing him notice and a hearing. The Supreme Court balances three factors when it identifies the minimum requirements for "notice and a hearing" under the due process clause:

> First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the governments' interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976). See also Birdsell v. Board of Fire and Police Commissioners, 854 F. 2d 204, 207 (7th Cir. 1988).

Both the Village and Mr. Kurr have substantial interests in the operation of water and sewer services in Mr. Kurr's subdivision. Obviously,

a municipality has a great interest in the methods by which it assumes control over and operates a water and sewer service for its residents and the residents of its unicorporated areas. At the same time, however, the Supreme Court has noted that residential homeowners have a substantial interest in continued water and sewer service to their homes. Cf. Memphis Light, 436 U.S. at 20, 98 S. Ct. at 1566 ("Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation."). Because both the Village and Mr. Kurr have substantial interests at stake, the court must examine the process the Village afforded Mr. Kurr before it terminated his water and sewer services and consider whether additional procedures would have reduced the

Mr. Kurr cannot seriously contend that he did not receive notice of the Village's intention to disconnect his water supply and sanitation service. Mr. Kurr's complaint alleges that he received ten communications, either by telephone or through the mail, regarding the impending actions of the Village. (Complaint, ¶ 8, 14, 15, 18, 21, 29, 30, and 37; Exhibit C, D, F, G, I, K, and S). Mr. Kurr therefore received adequate notice that the Village intended to disconnect his water and sewer service because he refused to sign a Water and Sewer Agreement.[11/]

Nor can Mr. Kurr contend that an additional hearing would have furthered the interest of the due process clause. Due process requires that a municipality provide a resident with a meaningfull opportunity to present their objection

at some kind of pre-deprivation hearing. Birdsell, 854 F. 2d at 207, quoting Wolff v. McDonnell, 418 U.S. 539, 577-78, 94 S. Ct. 2963, 2985-86 (1974). Mr. Boysen, who was at the time the Village's Director of Public Works, twice offered to discuss with Mr. Kurr his questions and concerns regarding the Water and Sewer Agreement. (Exhibits D and S). Mr. Kurr does not suggest that a meeting with Mr. Boysen was or would have been meaningless, or that some other kind of hearing would have been more fruitfull. In addition, Mr. Kurr admits in his Response to Chevy Chase's Motion to Dismiss that, on January 27, 1989, he attended an "informational meeting" called by the Village for the purpose of discussing the intended transfer of Chevy chase assets to the Village. (Response, p. 1). At this meeting, Mr. Kurr

expressed his view that the Water and Sewer Agreement was illegal and informed the Village that he would not sign it. (Reponse, p. 2). Mr. Kurr's suggestion that the Village owed him more process than that which he receive is unpersuasive.

The court cannot conclude that the Village should have afforded Mr. Kurr additional procedures before disconnecting his water and sewer services. Mr. Kurr's complaint therefore fails to state a claim against the Village under the due process clause.

3. Constitutionality of the Water and Sewer Agreement

Mr. Kurr seeks a declaration that the Water and Sewer Agreement is unconstitutional under the Fourth, Fifth, andFourteenth Amendments. After reading the complaint and the terms of the Water and Sewer Agrement, however, the court determines that the agreement

is not constitutionally defective.

Despite Mr. Kurr's allegations, the agreement does not require Mr. Kurr to waive his rights under the Fourth Amendment in order to obtain water and sewer service. The Agreement requires homeowners to allow Village employees access to the homeowners' property during reasonable hours for the purpose of "reading, examining, repairing or removing" water meters. (Complaint, ¶ 84; Exhibit E, ¶ E). these activities are necessary to the operation of a water and sewer system. The agreement therefore neither requires nor permits unreasonable "searches" of Mr. Kurr's property within the meaning of the Fourth Amendment.

Nor does the agreement deprive Mr. Kurr of property without just compensation in violation of the Fifth Amendment. The "just compensation"

clause forbids any government taking not for a public use without just compensation. See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 231, 104 S. Ct. 2321, 2329 (1984). The clauses in the Water and Sewer Agreement which Mr. Kurr believes constitute a "taking" state that the homeowner's "curb box," "water meter," "curb stop," and other sewerage and water facilities become the property of the Village when the homeowner signs the agreement. This limited interference with Mr. Kurr's property is necessary for the efficient operation of the water and sanitation services in Mr. Kurr's subdivision. The agreement provides for a "taking" of property only for public use, and does not violate the "just compensation" clause of the Fifth Amendment.

Finally, the agreement is not unconstitutionally vague merely because it does not specify the type of water ("i.e. rain-water, river-water, serwer-water, contaminated water, etc.", Complaint ¶ 88) the Village must provide to homeowners.

Implied into every contract is an obligation of good faith. Mr. Kurr and the Village each understand that the purpose of the contract is to supply potable water and sanitation services to signatory homeowners. Mr. Kurr's remedy in the event the Village fails to provide potable water to his residence is for breach of contract. The agreement therefore isnot unconstitutional under the Fourteenth Amendment.

The terms of the Water and Sewer Agreement do not violate the Fourth, Fifth or Fourteenth Amendments. Mr. Kurr's conplaint therefore fails to state a claim for declaratory relief on the theory that the agreement is constitutionally defective.

B. Civil Rights Violations

The remaining paragraphs of Mr. Kurr's complaint assert claims against the defendants under 42 U.S.C. Sections 1983, 1985(3), and 1986. The defendants have moved to dismiss each of these claims.

1. Section 1983

Mr. Kurr alleges that the defendants deprived him of his rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments in violation of Section 1983. According to the complaint, the Village defendants, either alone or in concert, violated Mr. Kurr's constitutional rights by

1. passing and approving Resolutions 87-53 and 87-54 (Complaint, ¶¶ 57, 79);

2. shutting off Mr. Kurr's water supply (Complaint, ¶ 59) and convincing Mr. Abberton not to provide him with an alternative supply of water (Complaint, ¶ 68);

3. sending him water bills and late notices (Complaint, ¶¶ 71, 75, 81);

4. directing employees of the Village's Department of Public Works to search Mr. Kurr's property to locate his sewers (Complaint, ¶ 66);

5. voting in an executive session to continue denying Mr. Kurr water (Complaint, ¶ 71); and

6. mailing letters to Mr. Kurr and directing the LCDH to contact MR. Kurr in order to encourage him to sign a Water and Sewer Agreement (Complaint, ¶¶ 62, 64, 73).

In addition, Mr. Kurr alleges that the Lake

County defendants participated with the Village in these deprivations by sending Mr. Kurr letters (Complaint, ¶¶ 61, 64, 73); telephoning Mr. Kurr's home and leaving messages on his answering machine (Complaint, ¶69); and leaving business cards at Mr. Kurr's home (Complaint ¶ 62).[12/]

In order to state a claim under Section 1983, Mr. Kurr mustallege that (1) he was deprived of a right guaranteed by federal law or the United States Constitution (2) by an individual acting under color of state law. This court has already addressed Mr. Kurr's Fourteenth Amendment claim and concluded that Mr. Kurr's complaint does not allege sufficient facts to support the assertion that he was denied procedural due process. The court concludes below that each of the other constitutional violations which Mr. Kurr alleges supports his Section 1983 claim must be dismissed as well.

a. First Amendment

Mr. Kurr alleges that Mr. Boysen's letter

requesting Mr. Abberton to disconnect Mr. Kurr's alternative water supply (Complaint ¶ 26) and Mr. Byer's attempts to telephone Mr. Kurr and discuss the Village's plan to dig up Mr. Kurr's sewers (Complaint, ¶¶29, 30) violated Mr. Kurr's freedom fo expression. (Complaint, ¶¶ 68, 69, 73, 77). In addition, Mr. Kurr alleges that Mr. Raysa's letter informing Mr. Kurr that his refusal to sign the "Water and Sewer Agreement" violated Illinois law (Complaint, ¶ 37) and the Board of Trustees's executive session and subsequent decision not to provide Mr. Kurr with potable water (Complaint, ¶ 40) deprived Mr. Kurr of his rights under the First Amendment.

Mr. Kurr has not alleged a deprivation of an interest protected by the First Amendment. The First Amendment freedom of speech applies only to protected forms of expression. Mr. Kurr's complaint does not allege sufficient facts from which the court can infer that the defendants' actions prohibited Mr. Kurr from

engaging in some form of expressive activity. The allegations of Mr. Kurr's complaint therefore do not support his assertion that the defendants' actions violated the First Amendment.

b. Fourth Amendment

Mr. Kurr alleges that the Village and Lake County defendants violated his right to be free from unreasonable searches and seizures by turning off Mr. Kurr's water supply (Complaint ¶¶ 11, 12), sending Mr. Kurr letters notifying him that the Village intended to dig up and disconnect his sewer unless he signed the Water and Sewer Agreement (Complaint, ¶¶ 21, 37), requesting Mr. Abberton to disconnect Mr. Kurr's alternative water supply (Complaint, ¶ 26), and telephoning Mr. Kurr to inform him that the Village intended to disconnect Mr. Kurr's sewers (Complaint, ¶¶ 29, 30).

The Village did not violate the Fourth Amendment by sending Mr. Kurr letters and telephoning his home. State action constitutes a "search" within meaning of the Fourth Amendment if the

government infringes upon a "constitutionally protected reasonable expectation of privacy." Andree v. Ashland County, 818 F. 2d 1306, 1314 (7th Cir. 1987), quoting Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507 (1967)(Harlan, J., concurring). Neither the Village nor the LCHD conducted a "search" when it attempted to communicate with Mr. Kurr via the telephone and through the United States Post Office. Mr. Kurr presumably consented to maintaining a mailbox and a telephone; he therefore must have expected telephone calls and letters from a variety of sources.

Nor did the Village violate the Fourth Amendment when it instructed its employees to disconnect Mr. Kurr's water supply. Contrary to Mr. Kurr's insistence, state action is not unreasonable merely because it violates state law. See Coniston Corp., 844 F 2d at 457. Moreover, even if Mr. Kurr has a legitimate expectation of privacy in his home and the areas surrounding it, [13/] the complaint does not allege that the Village employees acted

"unreasonably" when they turned off the water--e.g. by extending their invasion of Mr. Kurr's property beyond the intrustion necessary to turn off the water. The complaint does not allege sufficient facts to implicate either the Village or the Village employees in a Fourth Amendment violation.

c. Ninth Amendment

Mr. Kurr alleges that certain defendants violated his rights under the Ninth Amendment. The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The amendment preserves certain unarticulated fundamental rights which are implicit in the enumerated guarantees of the Bill of Rights. O'Donnel v. Village of Downers Grove, 656 F. Supp. 562, 569 (N.D. Ill. 1987). It is not a substantive source of constitutional guarantees; rather, the Drafters included it to "avoid lowering, degrading or rejecting any rights which are not specifically mentioned in the Constitution." O'Donnell,

supra; Grossman v. gilchrist, 519 F. Supp. 173, 176 (N.D. Ill. 1981), aff'd 676 F. 2d 701 (7th Cir. 1982).

Mr. Kurr's complaint does not allege that defendants' actions deprived him of any fundamental right guaranteed by the Ninth Amendment. Mr. Kurr does not have a fundamental right to an uninterrupted supply of water from the Village. Consequently, Mr. Kurr cannot support his Section 1983 claim on the allegation that the defendants deprived him of his rights under the Ninth Amendment.

Mr. Kurr's complaint does not allege sufficient facts to support his claim that the defendants' actions deprived him of a right secured by federal law or the United States Constitution. Accordingly, the complaint fails to state a claim under Section 1983.[14/]

2. Section 1985(3)

The complaint asserts that virtually all of the defendants as a group participated in a conspiracy to deprive Mr. Kurr of equal protection

of the laws in violation of Section 1985(3).[15] However, Mr. Kurr cannot state a claim under Section 1985(3) for the loss of his water and sewer services. Section 1985(3) reaches only "racially-motivated" conspiracies, Stevens v. Tillman, 855 F. 2d 394, 404 (7th Cir. 1988) cert. denied _____U.S. ___, 109 S. Ct. 1339 (1989)(citations omitted), or conspiracies based on sex, religion, ethnicity, or political loyalty. Volk v. Coler, 845 F. 2d 1422, 1434 (7th Cir. 1988). Mr. Kurr does not allege in his complaint that any of the defendants conspired against him because he was a member of any of these classes. Therefore, Mr. Kurr's complaint fails to state a claim under Section 1985(3).

3. Section 1986

Finally, Mr. Kurr maintains that certain defendants are liable to him under Section 1986 for failing to prevent the other defendants from violating his constitutional rights.[16] Liability under Section 1986 is derivative of Section 1985(3) liability; without a violation of Section

1985(3), there can be no violation of Section 1986. Grimes v. Smith, 776 F. 2d 1359, 1363 (7th Cir. 1985); Rodgers v. Lincoln Towing Service, Inc., 771 F. 2d 194, 203(7th Cir. 1985). Mr. Kurr's complaint therefore fails to state a claim under Section 1986.

C. Violations of State Law

Finally, Mr. Kurr's complaint purports to state a cause of action against certain of the defendants for breach fo contract, interference with contractual relationships, libel, invasion of privacy, harassment, and commpn law duty. Because each of Mr. Kurr's federal claims must be dismissed for failure to state a claim upon which relief may be granted, the court relinquishes its pendent jurisdiction over Mr. Kurr's state claims as well. See Huffman v. Hains, 865 F 2d 920, 922-23 (7th Cir. 1989).

CONCLUSION

For the reasons stated in this memorandum opinion, Mr. Kurr's complaint is DISMISSED for failing to state a claim upon which relief

may be granted.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: May 31, 1989

FOOTNOTES

1) The Board consisted of Verna Clayton, Gary Clover, Melanie Kowalski, John Marienthal, William Reid, Patrick Shields, and Jordan Shifrin. Each of these individuals are named as defendants in this action.

2) All exhibit references are to exhibits attached to plaintiff's complaint.

3) These Resolutions and their related agreements were not singed by the Village President (Verna Clayton) and the Village Clerk (Janet Siraban), both of whom are defendants in this case, until June 27, 1988, nearly eight months after the Board approved them.

4) The LCHD's attempts to contact Mr. Kurr continued despite Mr. Kurr's November 17, 1987 letter. On November 25, 1987 Jon Cunningham, an Associate Sanitarian for the LCHD, left his business card in Mr. Kurr's mailbox. Apparently, Mr. Kurr did not respond to the LCHD's communications.

5) By this time, defendant Sidney Mathias had replaced Melanie Kowalski on the Village Board of Trustees.

6) Mr. Kurr also began receiving bills for water and sewer treatment at his home. On May 17, 1988 Mr. Kurr received a bill for "Lake Cty Sewer Treat." (Exhibit P). Mr. Kurr objected to his bill in writing in a letter to Mr. Boysen dated June 3, 1988. On June 17 and August 18, 1988 Mr. Kurr received "Late Notices" from the Village for failing to pay the May 17, 1988 bill.

7) Some doubt exists as to whether Mr. Kurr actually enjoyed a property interest in the Village's water and sewer services. In Craft, the Supreme Court held that a customer asserted a protected property interest under the due process clause in continued water and sewer service. 98 S. Ct. at 1561. Other cases have also concluded that a plaintiff has a protected property interest in continued water service. Freeman v. Hayek, 635 F.

Supp. 178, 182 (D. Minn. 1986); Bradford v. Edelstein, 467 F. Supp. 1361, 1376 (D. Tex. 1979), and cases cited; Lamb v. Hamblin, 57 F.R.D. 58, 61 (D. Minn. 1972). In this case, Mr. Kurr does not assert an interest in continued water service provided by the Village; he recieved his water and sewer service from Chevy Chase prior to the date his water service was discontinued. Thus, the question of whether Mr. Kurr has a protected property interest in the Village's utility services is not clear cut.

8) Section 1 of this Division provide. :

> The corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas outside the corporate limits. Such service shall not be extended, however, unless a majority of the owners of record of the real property in the specified area petition the corporate authorities for the service.

Ill. Stat. Ann. ch. 24, Section 11-149-1 (Supp. 1988).

9) The court does not have a copy of the Buffalo Grove Municipal Code. Mr. Kurr alleges that the relevant provisions state:

A. Service may be discontinued when any payment is past due. Service may not be resumed until the payment of all charges . . . .

B. Service shall not be discontinued until a minimum of three days' notice has been given to the person to whom the bills are mailed that the person will be given an opportunity to be heard as to why the service should not be discontinued.

10) These provisions provide, in essence, that "every building intended for human habitation shall be provided with potable water supply." (Complaint, ¶ 55).

11) The court notes also that the documents which Mr. Kurr filed on October 5, 1988 to support his Motion for a Temporary Restraining Order indicated that Mr. Kurr received additional notice and another hearing well before November, 1987. According to these documents, Mr. Kurr first learned that the Village intended governments'

to assume operational control of Chevy Chase on January 9, 1987 via a letter mailed to him by Mr. Boysen. (Exhibit AC).

12) Mr. Kurr's conplaint does not name Mr. Munson, Mr Potsic, or the Johnsons in any of his Section 1983 allegations. Rm. Kurr names Chevy Chase and Mr. Lang in Paragraph 73, by neither Chevy Chase nor Mr. Lang were involved directly or indirectly in the communication which Mr. Kurr asserts in Paragraph 73 violated his constitutional rights.

13) The court presumes that the gist of Mr. Kurr's Fourth Amendment claim is that the employees violated the Fourth Amendment by entering onto Mr. Kurr's property to turn off the water.

14) Chevy Chase argues that it cannot be liable under Section 1983 because it is not a state actor. Because the complaint fails to allege a deprivation of Mr. Kurr's constitutional rights, the court need not address this issue.

15) Mr. Kurr excludes Catherine Johnson, Steven

Potsic, Judith Munson and Jon Cunningham from this alleged conspiracy.

16) Mr. Kurr names LCHD, Mr. Byers, Mr. Boysen, the Village, Mr. Raysa, Mr. Balling, Mr. Brimm, Chevy Chase, Mr. Lang, and Ms. Munson as defendants under Section 1986.

No. 90-828

In The

Supreme Court of the United States

October Term, 1990

MELVIN R. KURR,

Petitioner,

vs.

VILLAGE OF BUFFALO GROVE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

STEPHEN E. FORD,
Counsel of Record
JEFFREY S. PAVLOVICH
KIESLER & BERMAN
188 W. Randolph
Suite 1300
Chicago, IL 60601
Telephone: (312) 332-2840

Attorneys for Respondents, Lake County Health Department; County of Lake, State of Illinois; Steven Potsic, Executive Director, Division of Environmental Health, Lake County Health Department; Ted Byers, District Supervisor, Division of Environmental Health, Lake County Health Department; Jon Cunningham, Associate Sanitarian, Division of Environmental Health, Lake County Health Department.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Water and Sewer Agreement tendered by the Village is violative of the Petitioner's Fourth Amendment rights.

2. Whether the Seventh Circuit Court of Appeals erred in not addressing an equal protection claim not raised in the district court.

3. Whether Petitioner was afforded procedural due process of law in connection with the termination of his water and sewer service.

LIST OF ALL PARTIES TO PROCEEDING

Petitioner's List of Parties is true and accurate to the extent provided, but should also include Respondents STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and JUDITH MUNSON, staff attorney, Illinois Department of Public Health.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

REASONS FOR DENYING THE WRIT

I

STATEMENT OF CASE

The statement of case contained herein is an abridged adaptation of the facts in the District Court's Memorandum Opinion and Order. Petition for Writ of Certiorari, Appendix, pp. B-1 – B-44.

The petitioner, Mr. Kurr, owns a home in Lake County, Illinois. In 1976, Mr. Kurr entered into an oral contract with defendant Chevy Chase permitting him to connect with Chevy Chase's water and sewer mains. Mr. Kurr began paying Chevy Chase for water and sewer services in October, 1976, and continued to do so until November, 1987.

In November of 1987 the Board of Trustees for the Village of Buffalo Grove passed Resolutions 87-53 and 87-54. These resolutions obligated Chevy Chase to make certain improvements to its facilities and approved an agreement whereby Chevy Chase would transfer its water and sewer systems to the Village. These resolutions and the related agreements authorized the Village to provide water and sewer services to homeowners who had previously been serviced by Chevy Chase.

On November 3, 1987, Mr. Kurr received a letter from the Vice President of Chevy Chase notifying him that his water and sewer service would be disconnected unless he submitted a signed "Water and Sewer Agreement" to the Village. On the same day, the Village's Director of Public Works sent a letter to Mr. Kurr certifying that a copy of

the "Water and Sewer Agreement" had been placed in Mr. Kurr's mailbox.

On November 5, 1987, at 9:00 a.m., the Village disconnected Mr. Kurr's water supply. Mr. Kurr unsuccessfully complained of this action to the Village's Director of Public Works and to Mr. William Johnson, the Vice President of Chevy Chase. Shortly after the water was disconnected, the Lake County Health Department ("LCHD") attempted to convince Mr. Kurr to sign a Water and Sewer Agreement. Specifically, on November 13, 1987, defendant Ted Byers, the District Supervisor for the LCHD, notified Mr. Kurr that the LCHD would seek legal action if he did not reconnect to the Village's water supply. In response, Mr. Kurr contacted Mr. Byers and Steven Potsic, the Executive Director of the LCHD, and complained that his water and sewer service was wrongfully disconnected by the Village when it took possession of Chevy Chase.

Mr. Kurr next sought assistance from the State of Illinois to correct the allegedly wrongful actions of the Village. The Illinois Attorney General's Office, who Mr. Kurr first complained to, forwarded the complaint to the Illinois Department of Public Health (the "IDPH"). The IDPH, however, notified Mr. Kurr, on June 23, 1988, that it could not take action against the Village for denying a supply of water under these circumstances.

During this time, the LCHD and the Village persisted in their attempts to convince Mr. Kurr to sign a "Water and Sewer Agreement." Mr. Byers telephoned Mr. Kurr numerous times and warned him that the Village would dig up his sewer if he did not submit a signed agreement.

The Village's attorney, defendant Raysa, also was in contact with Mr. Kurr and informed him that Illinois law required a signed Water and Sewer Agreement before water and sewer service would be provided. Mr. Kurr replied, by registered letter, that the Village and its employees had acted unlawfully in disconnecting him from the water system. Thus, Mr. Kurr refused to sign a "Water and Sewer Agreement," and the Village Board voted in an Executive Session not to restore water service to Mr. Kurr's home.

Mr. Kurr filed a Complaint against various defendants, including Respondent Lake County Health Department and several of its directors and employees in U.S. District Court on October 25, 1988. Mr. Kurr's Complaint alleged that defendants' actions violated his rights under the United States Constitution, Art. I, Section 10 and Amendment 14; the Illinois Constitution, Art. I, Sections 2 and 16; and 42 USC Sections 1983, 1985(3) and 1986. In addition, Mr. Kurr's Complaint alleged that the Water and Sewer Agreement deprived him of property without just compensation in violation of the Fifth Amendment; violated his Fourth Amendment freedom from unreasonable searches and seizures; and deprived him of property without due process of law. In the Complaint Kurr also asserted various pendent claims under Illinois law against certain defendants. For purposes of this Petition, however, Mr. Kurr raises only issues concerning his Fourth Amendment, due process and equal protection rights.

Motions to dismiss plaintiff's Complaint were filed on behalf of all defendants pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On May 31, 1989,

the United States District Court for the Northern District of Illinois issued a Memorandum Opinion and Order dismissing the plaintiff's Complaint for failure to state a claim upon which relief could be granted. Petition for Writ of Certiorari, Appendix, pp. B-1 – B-44. This decision was affirmed by the United States Court of Appeals for the Seventh Circuit with its Order of August 28, 1990. Respondent's appendix, p. App. 1.

II

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution offers protection against unreasonable searches and seizures. This protection, however, is not absolute and does not extend to searches deemed reasonable. Accordingly, in the instant matter, Petitioner cannot be heard to complain of the Village's actions, since they are reasonable searches necessary for the operation of the water and sewer system.

The Petitioner also cannot be heard by this Court to complain of a violation of his equal protection or due process rights. The alleged equal protection violations were not raised by Petitioner as an issue in either the trial court or the Court of Appeals, and are thus not preserved for review.

Finally, Petitioner received both adequate notice and numerous opportunities for a pre-deprivation hearing so as to satisfy the due process requirements.

III

ARGUMENT

A.

THE VILLAGE'S WATER AND SEWER AGREEMENT DOES NOT SUBJECT PETITIONER TO AN UNREASONABLE SEARCH OR CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT BUT INSTEAD PRESCRIBES CONSTITUTIONALLY VALID ACTIVITIES NECESSARY FOR THE OPERATION OF A WATER AND SEWER SYSTEM.

The Fourth Amendment to the United States Constitution provides that people should be "secure in their persons, house, papers and effects, against unreasonable searches and seizures . . . "

It is important to note that this constitutional provision does not proscribe all searches, but only those which are deemed unreasonable. Petitioner attempts to create a Fourth Amendment constitutional question by arguing that a "warrantless search" such as the one prescribed by the "Water and Sewer Agreement" is presumptively unreasonable, and by arguing that the lower courts' opinions are in "serious conflict with the applicable decisions of this court." Upon analysis, however, it is clear that the "searches" contemplated by the "Water and Sewer Agreement" are not unreasonable, and thus not violative of the Fourth Amendment, and that the lower courts' opinions are not in "serious conflict with the applicable decisions of this Court."

The provision of the "Water and Sewer Agreement" which Petitioner claims is violative of his Fourth Amendment rights provides as follows:

> E. Allow authorized agents of the village free access to the premises at all reasonable hours for the purpose of reading, examining, repairing or removing the Village's meters or other property, and also the applicant's lines and connections.

This provision, however, and the activities prescribed therein, are not violative of the Fourth Amendment's guarantee against *unreasonable* searches. Instead, the activities prescribed by the Agreement are necessary to the operation of a water and sewer system, and thus constitute *reasonable* "searches." These reasonable searches, as noted above, do not constitute an intrusion upon Petitioner's Fourth Amendment rights in a constitutional sense.

Petitioner, in urging his Fourth Amendment argument, also states that the lower courts' opinions are in conflict with the applicable decisions of this Court. A review of Fourth Amendment case law, however, demonstrates that this position is erroneous.

In arguing that the lower courts' opinions are in conflict with the applicable decisions of this court, Petitioner cites *Steagald v. United States*, 451 U.S. 204 (1980) and *Payton v. New York*, 445 U.S. 573 (1980), for the proposition that a warrantless search of a private residence is presumptively unreasonable. These cases, however, are factually inapposite from the situation presented here. Specifically, the issue in *Steagald* was whether an arrest warrant was adequate to protect the Fourth Amendment interests of persons not named in the warrant when their homes were searched without consent and in the absence of exigent circumstances. *Steagald*, 451

U.S. at 212. Further, the issue in *Payton* involved the warrantless arrest of a suspect in his home. These opinions in no way reflect an inconsistency with the opinions of the lower courts in the instant matter, and simply do not provide a basis for a Writ of Certiorari. As stated above, the "searches" in the case at bar were, quite simply, reasonable and necessary, if one can even classify the events herein described as "searches."

B.

THE FAILURE OF THE COURT OF APPEALS TO ADDRESS PETITIONER'S EQUAL PROTECTION CLAIM WAS WITHOUT ERROR AND DOES NOT CONSTITUTE THE BASIS FOR A WRIT OF CERTIORARI

In his Petition for Writ of Certiorari, Petitioner states that while on appeal, he "did not make the failure of the District Court to address the equal protection claim a separate question for review." By doing such, however, Petitioner has failed to preserve the equal protection issue for appellate review, and therefore cannot be heard on the issue before the United States Supreme Court, nor make it grounds for a Writ of Certiorari.

C.

PETITIONER WAS AFFORDED DUE PROCESS OF LAW IN THE TERMINATION OF HIS UTILITY SERVICE BECAUSE ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD WERE PROVIDED.

To demonstrate a denial of due process, one must first establish that (1) he was deprived of a constitutionally protected life, liberty, or property interest, and

(2) that he was not afforded the process due under the circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972). In his Petition for Writ of Certiorari, Mr. Kurr maintains that he was denied due process of law when the Village terminated his water and sewer service. A review of the circumstances and relevant case law, however, clearly shows that Mr. Kurr was afforded due process of law.

In determining whether the minimum requirements for "notice and a hearing" under the due process clause are satisfied, this Court balances three factors. Specifically, as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court considers the following:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the governments' interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As noted by the District Court in its Memorandum Opinion and Order, there exists both a substantial private and government interest in the case at bar which must be considered together. Mr. Kurr has a substantial interest in continued water and sewer service to his home, and the Village has a significant interest in the manner by which it operates and controls the water and sewer service of its residents. Since there are both substantial private and government interests, the focal point of the analysis herein must be the process afforded Mr. Kurr.

Mr. Kurr was afforded process which adequately notified him of the Village's intention to disconnect his water and sanitation services, and he was presented with a meaningful opportunity to present objections at a pre-deprivation hearing. See *Birdsell v. Board of Fire and Police Commissioners*, 854 F.2d 204 (7th Cir. 1988), *quoting Wolf v. McDonnell*, 418 U.S. 539, 577-78 (1974). Concerning a pre-deprivation hearing, Mr. Kurr had numerous attempts to voice his objections. First, on January 27, 1989, almost ten full months before his utility services were disconnected, Mr. Kurr attended an "informational meeting" concerning the intended transfer of Chevy Chase assets to the Village. At this meeting, Mr. Kurr noted his objection that the "Water and Sewer Agreement" was illegal and stated that he would not sign it. Next, the Village's Director of Public Works, Mr. Boysen, twice offered to discuss with Mr. Kurr his concerns about the "Water and Sewer Agreement." Thus, in accordance with his due process rights, Mr. Kurr was presented with numerous opportunities to voice his objections prior to his water and sewer services being disconnected.

Mr. Kurr was also afforded adequate notice to protect his due process rights. As noted by the District Court, Petitioner received numerous communications, both by telephone or through the mail, regarding the impending proposed actions of the Village. Petition for Writ of Certiorari, App. p. B-23. These communications provided more than adequate notice to the petitioner and sufficiently guaranteed protection of his due process rights. Thus, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Contrary to the arguments of Petitioner, neither his Fourth Amendment nor due process rights were violated when his water and sewer service were disconnected. Further, the Petitioner, despite liberal rules afforded pro se litigants, is precluded from raising equal protection issues before this Court when he failed to do so in the lower courts. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

STEPHEN E. FORD,
Counsel of Record
JEFFREY S. PAVLOVICH

Attorneys for Respondents,
Lake County Health Department;
County of Lake, State of Illinois;
Steven Potsic, Executive Director,
Division of Environmental Health,
Lake County Health Department;
Ted Byers, District Supervisor,
Division of Environmental Health,
Lake County Health Department;
Jon Cunningham, Associate
Sanitarian, Division of
Environmental Health, Lake County
Health Department.

STEPHEN E. FORD, Of Counsel
JEFFREY S. PAVLOVICH, Of Counsel
KIESLER & BERMAN
188 W. Randolph
Suite 1300
Chicago, Illinois 60601
Telephone: (312) 332-2840

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted August 21, 1990*

August 28, 1990

Before

Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Wilbur F. Pell, Senior Circuit Judge

MELVIN R. KURR, Plaintiff-Appellant, No. 89-2321 vs. VILLAGE OF BUFFALO GROVE, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 88 C 9051 James F. Holderman, *Judge.*

ORDER

Plaintiff-Appellant, Melvin R. Kurr, appeals from the district court's decision dismissing his cause of action and entering judgment in favor of the defendants. After reviewing the decision of the district court, the briefs,

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). Plaintiff-Appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

and the record, we have determined that it properly identified and resolved the issues before us on appeal; therefore, we affirm the decision of the district court for the reasons stated in the attached memorandum opinion.

On appeal, the Village of Buffalo Grove seeks fees and costs pursuant to 42 U.S.C. § 1988 and under Rule 11 of the Federal Rules of Civil Procedure, arguing that the appeal was frivolous. Rule 11 is an inappropriate vehicle for obtaining sanctions in this court; however, Rule 38 of the Federal Rules of Appellate Procedure does provide for the imposition of damages and costs for taking a frivolous appeal. Therefore, we will analyze the request for fees and costs under § 1988 and Rule 38.

In this case, the district court provided the appellant with a twenty-five page detailed analysis of why his allegations failed to state a claim under Rule 12(b) (6) of the Federal Rules of Civil Procedure. In *Hughes v. Rowe*, 449 U.S. 5, 101 S. Ct. 173 (1980), the Supreme Court noted that a plaintiff in a civil rights action under § 1983 " 'should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' " *Id.* at 15, 101 S. Ct. at 178-79 (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422, 98 S. Ct. 694, 701 (1978)). In deciding to file an appeal after the district court's detailed and comprehensive disposition, Kurr elected to continue to litigate after his claim had clearly become frivolous; therefore, we impose sanctions pursuant to § 1988 and Rule 38 of the Federal Rules of Appellate Procedure. The Village is ordered to file within fourteen days a statement of the costs and attorney's fees it has incurred in litigating this appeal.

NO. 90-828

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MELVIN R. KURR,

PETITIONER,

-VS-

VILLAGE OF BUFFALO GROVE, ET AL.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

Melvin R. Kurr
9 E. Chevy Chase Drive
Wheeling, Illinois 60090
(708) 215-7665

Petitioner, Pro se

ARGUMENT

Question 1

The respondents claim the Water and Sewer Agreement requirement the petitioner must grant to Village agents the authority to conduct warrantless "free access" searches and seizures, without any kind of notice, of the petitioner's home is reasonable because such activities "are necessary to the operation of a water and sewer system," (see Brief in Opp. p. 6). However, such reasoning is seriously flawed.

First, if warrantless "free access" entries are "necessary" why are village residents customers entitled to demand "presentation of a warrant," (see Petition for Writ, pp. 19 & 27).

Secondly, even if free access is "necessary" it does not negate the right of the petitioner to demand a warrant from Village agents. This Court has made this

point clear in Michigan v. Tyler, 436 US 499 (1978) stating:

> "Searches for administrative purposes ... are encompassed by the Fourth Amendment. [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. The showing of probable cause necessary to secure a warrant may very with the object and intrusiveness of the search, but the necessity for the warrant persists," (emphasis added), (citation and footnote omitted), 436 US at 506.

The respondents also suggest two cases cited in the Petition [Payton v. New York, 445 US 573 (1980), and Steagald v. United States, 451 US 204 (1981)], have no relevance to the Fourth Amendment issue in the instant cause because both cases deal with criminal as opposed to administrative warrantless searches, (Brief in Opp. pp. 6-7).

However, in Payton Justice WHITE in his dissenting opinion cites at 445 US 620 Marshall v Barlow's Inc., 436 US 307 (1978) and Camara v. Municipal Court, 387 US 523

(1967). And Justice REHNQUIST's dissenting opinion in Steagald 451 US 225-226 also cites Barlow's and Camara. Both Barlow's and Camara concerned the necessity of a search warrant for administrative purposes. Further, there are numerous administrative search warrant cases that cite criminal cases [see, e.g., Michigan v. Tyler, supra, 436 US at 509 citing Coolidge v. New Hampshire, 403 US 443 (1971)]. So, it is clear that citing a criminal case in an administrative case; and vice versa, is a totally acceptable practice. For the respondents to even imply Village agents do not need to obtain a warrant to enter the petitioner's home merely because he is not suspected of a crime is truly absurd.

> "To say a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." District of Columbia v. Little, 178 F2d 13, 17 (1949), aff'd on other grounds, 339 US 1 (1950).

Question 2

Contrary to the respondents proposition that the petitioner did not raise an equal protection claim in the district court, the petitioner did raise the claim in the district court, (see Petition for Writ, pp. 27-29). However, the district court in its memorandum opinion and order failed to state why residents may demand "presentation of a warrant" while the petitioner must allow "free access." And as explained in the Petition, although the failure of the district court to address the equal protection issue was not a distinct question for review by the appeals court, the petitioner's appeals court brief made it plain that such non-decision by the district court was sought for review.

Question 3

The Petition for Writ explained the Village failed to inform the petitioner that his utility service was subject to termi-

nation by the Village. The only notice the petitioner received concerning possible termination of service was from Chevy Chase, and not from the Village, (Petition p. 32). Nor was the petitioner afforded a hearing before an official empowered to entertain the petitioner's complaint that the Water and Sewer Agreement contained unfair provisions.

Conclusion

For reasons set-forth in the Petition for Writ of Certiorari and this Reply Brief the petitioner prays that this Honorable Court grant the Writ to correct the errors committed by the district and appeals courts.

RESPECTFULLY SUBMITTED,

MELVIN R. KURR,
Petitioner, pro se